UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

HOLLY DAGDAG,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.: 3:16-CV-364-TAV
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION

Holly Dagdag has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Respondent has filed a response in opposition to the motion. Having considered the pleadings and the record, along with the relevant law, the Court finds that it is unnecessary to hold an evidentiary hearing,[1] and Dagdag's § 2255 motion will be denied.

I. BACKGROUND FACTS AND PROCEDURAL HERTORY

Dagdag pleaded guilty and was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C) [Doc. 39 in No. 3:13-CR-171]. As part of her guilty plea, Dagdag waived her rights to appeal and file any motions pursuant to 28

[1] An evidentiary hearing is required on a § 2255 motion unless the motion, files, and record conclusively show that the prisoner is not entitled to relief. *See* 28 U.S.C. § 2255(b). It is the prisoner's ultimate burden, however, to sustain her claims by a preponderance of the evidence. *See Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). Accordingly, where "the record conclusively shows that the petitioner is entitled to no relief," a hearing is not required. *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (citation omitted).

U.S.C. § 2255, with the exception of claims of ineffective assistance of counsel and prosecutorial misconduct [Doc. 18 ¶ 10(b) in No. 3:13-CR-171]. Based on the drug quantity Dagdag stipulated to when pleading guilty, a two-level firearms enhancement, and a three-level reduction for acceptance of responsibility, Dagdag's total offense level was 19 [Doc. 26 ¶¶ 17, 23-24, 30-32 in No. 3:13-CR-171]. Her prior convictions yielded 10 criminal history points, a criminal history category of V, and a corresponding United States Sentencing Guidelines ("Guidelines") range of 57 to 71 months' imprisonment [*Id*. at ¶¶ 47, 65]. Dagdag was sentenced to 57 months' imprisonment [Doc. 39 in No. 3:13-CR-171]. Dagdag did not appeal. The Court thereafter reduced Dagdag's sentence to 46 months' imprisonment pursuant to 18 U.S.C. § 3582(c)(2) and Guidelines Amendment 782 [Doc. 43 in No. 3:13-CR-171].

In June of 2016, Dagdag filed the instant § 2255 motion for a lesser sentence in light of the holding of *Johnson v. United States*, which invalidated the residual clause of the Armed Career Criminal Act ("ACCA"). *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) [Doc. 1]. The United States responded to the motion on July 25, 2016 [Doc. 2]. This matter is ripe for review.[2]

[2] Dagdag was released from incarceration after she filed her § 2255 motion. However, her supervision was revoked in May of 2018, and she was resentenced to 7 months' imprisonment followed by 24 months' supervised release [Docs. 54 & 55 in No. 3:13-CR-171]. According to information on the website of the Federal Bureau of Prisons, Dagdag was released from incarceration on December 11, 2018. *See* https://www.bop.gov/inmateloc/ (search by "Find by Name") (last visited May 2, 2019). Because Dagdag is currently serving a term of supervised release, the Court assumes that she is "in custody" for purpose of the instant motion. *See, e.g., United States v. Zack*, 173 F.3d 431, 1999 WL 96996 at, *1 (6th Cir. February 1, 1999).

II. LEGAL STANDARD

After a defendant has been convicted and exhausted her appeal rights, a court may presume that "[s]he stands fairly and finally convicted." *United States v. Frady*, 456 U.S. 152, 164 (1982). A court may grant relief under 28 U.S.C. § 2255, but the statute "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, collateral attack limits a movant's allegations to those of constitutional or jurisdictional magnitude, or those containing factual or legal errors "so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (citation omitted); *see also* 28 U.S.C. § 2255(a).

III. DISCUSSION

A. Waiver

In her plea agreement, Dagdag expressly "waive[d] the right to file any motions or pleadings pursuant to 28 U.S.C. § 2255" with the exception of "claims of ineffective assistance of counsel or prosecutorial misconduct" [Doc. 18 ¶ 10(b) in No. 3:13-CR-171]. A knowing and voluntary waiver of § 2255 claims is enforceable. *Davila v. United States*, 258 F.3d 448, 450-51 (6th Cir. 2001). There is no dispute that Dagdag entered into a knowing and voluntary plea agreement. Therefore, because Dagdag's claims are not for ineffective assistance of counsel or prosecutorial misconduct, they are barred by her § 2255 waiver.

It is irrelevant that Dagdag entered into her waiver before *Johnson* was decided. After all, a "plea agreement allocates risk, and the possibility of a favorable change in the

law after a plea is simply one of the risks that accompanies pleas and plea agreements." *Slusser v. United States*, 895 F.3d 437, 440 (6th Cir. 2018) (citation and quotation marks omitted). Accordingly, Dagdag has waived her right to challenge her sentence under the reasoning of *Johnson*.

B. Merits

Neither would Dagdag be entitled to relief upon consideration of the merits of her motion. Dagdag's complaint is that she received criminal history points because of her prior convictions [Doc. 1 p. 4]. However, Dagdag received criminal history points because her prior convictions constituted "sentences of imprisonment" or "prior sentences" under § 4A1.1 of the Guidelines [*See* Doc. 26 ¶¶ 36, 39, 41-43, 45-46 in No. 3:13-CR-171]. Dagdag was not sentenced as an armed career criminal, nor as a career offender, nor was her sentenced enhanced due to a "crime of violence" under the Guidelines. Accordingly, the residual clause invalidated in *Johnson* has no relationship to the Guidelines provisions under which Dagdag received criminal history points for her prior convictions.

IV. CERTIFICATE OF APPEALABILITY

When considering a § 2255 motion, this Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts. Dagdag must obtain a COA before she may appeal the denial of her § 2255 motion. 28 U.S.C. § 2253(c)(1)(B). A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For cases rejected on their

merits, a movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" to warrant a COA. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA on a claim that has been rejected on procedural grounds, a movant must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. Based on the *Slack* criteria, the Court finds that a COA should not issue in this cause.

V. CONCLUSION

For the reasons stated herein, Dagdag has failed to establish any basis upon which § 2255 relief could be granted, and her motion will be **DENIED**. A COA from the denial of her § 2255 motion will be **DENIED**. The Court **CERTIFIES** that any appeal from this action would not be taken in good faith and would be frivolous. Fed. R. App. 24. Therefore, Petitioner will be **DENIED** leave to proceed *in forma pauperis* on appeal. Fed. R. App. P. 24.

An appropriate Order will enter.

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE